

CLIENT ALERT

State UDAP Laws are a Treasure Trove of Civil Penalties for Price Gouging

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A cursory search of state laws and emergency declarations on price gouging indicates that a number of states do not have laws or orders prohibiting price gouging. However, what may be less apparent is that most states have a consumer protection law prohibiting unfair and deceptive trade practices (“UDAP”). Most UDAP laws broadly prohibit any act deemed an unconscionable, unfair, or deceptive trade practice, a prohibition that likely encompasses price gouging. These laws also contemplate a wide range of potential remedies including restitution, attorneys’ fees and civil penalties, and many also provide for a private right of action. Moreover, several State Attorneys General have announced that they will bring enforcement actions against price gouging under their states’ UDAP laws. In fact, several have done so already. Due to the sweeping nature of these laws, both in terms of behavior covered and potential remedies, businesses should take notice that these laws exist and may be used to prohibit any potentially “unfair” or “unconscionable” price increases during the COVID-19 crisis.

UDAP laws have very broad language covering a host of activities. These laws forbid any unfair business practice, whether such practice is fraudulent or deceptive, and whether or not it is intended to harm consumers. Many of these laws also prohibit unconscionable conduct. State regulators, and more importantly state courts, liberally construe both of these standards in order to protect consumers. For example, Nebraska’s UDAP law makes unlawful any “unconscionable act or practice by a supplier in connection with a consumer transaction.” New Mexico’s law prohibits “[u]nfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce.” Since state laws cannot (and do not) list every type of conduct that could be unfair or unconscionable – it would be impossible to do so – regulators and courts will look to the specific facts of each case to determine whether a business has violated the applicable UDAP law.

This is important since UDAP laws provide for a variety of penalties once enforced. For example, California’s law allows for a civil penalty up to \$2,500 for each violation, injunctive relief, and damages, as well as attorneys’ fees and costs. Arizona’s permits civil penalties of up to \$10,000 per willful violation, as well as injunctive relief, attorneys’ fees, and costs. It is worth noting that many states also enforce more specific price gouging statutes under their UDAP laws by defining price gouging as an unfair or deceptive practice. Maryland’s UDAP law, under which its price gouging provision is prosecuted, provides for injunctive relief, disgorgement and restitution, and civil penalties in the sum of \$10,000 per violation. An infraction also exposes the business to misdemeanor criminal prosecution. California has a 10% threshold for price gouging. Moreover, on April 3, 2020, California’s Governor issued an Executive Order applying the state law’s prohibitions to all “food items; consumer goods; medical or emergency supplies; and any other materials previously designated by the U.S. Secretary of Health and Human Services as Scarce Materials or Threatened Materials pursuant to [the Defense Production Act].” However, the Executive Order provides the price gouging restrictions do not apply to contracts negotiated directly with the state or any of its political sub-divisions. New York’s declaration of an emergency triggers its price gouging law, which does not have a specified percentage threshold but instead prohibits an unconscionably excessive price increase.

Courts also have wide discretion in most states to determine what is a violation and how many violations occurred for purposes of calculating the total amount of civil penalties. Under California law, courts must consider relevant facts, including any of the

following factors, when assessing civil penalties: “the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant’s assets, liabilities, and net worth.”

UDAP laws also often allow an individual to pursue a private action against the infringing company. To name a few examples, Nebraska’s UDAP law explicitly provides for a private right of action, as well as Alaska’s, Maryland’s and New Mexico’s. This could open the door in some states for class actions on behalf of consumers if businesses are not careful during the current pandemic (and beyond).

Finally, State Attorneys General have statutory authority and power to enforce consumer protection laws, and many have warned that they will do so. Some, such as Missouri Attorney General Eric Schmitt, have issued civil investigative demands requiring sellers to produce information about the pricing and sales of necessary goods. In Washington, Attorney General Bob Ferguson sent cease and desist letters to sellers excessively raising their prices. Nevada Attorney General Aaron Ford stated that he is monitoring for price gouging of necessary goods such as water, cleaning supplies, and health products, and that his office has the “ability to review” these complaints. Though Illinois’s law only explicitly covered price gouging of petroleum products, in April Illinois Governor J.B. Pritzker issued an Emergency Proclamation prohibiting price gouging pursuant to the Illinois Emergency Management Agency Act, which allows the Governor to prohibit price increases of goods and services during a disaster.

Among the other novel issues posed by the COVID-19 crisis, it is essential that companies remain apprised of state UDAP laws and how State Attorneys General are approaching them. It is particularly important to recognize that State Attorneys General could view acts that were never intended to harm consumers as actually harming them during the current pandemic, especially since many State Attorneys General have publicly stated that companies should bear the risk of losses due to the current crisis. It is therefore critical, now more than ever, that businesses be cognizant of the risk of running afoul of these broad enforcement tools and avoid exposing themselves to liability.

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